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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

NO. 72-1525

UNITED STATES OF AMERICA, Respondent

v.

VINCENT SUNDRY, Petitioner.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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APPENDIX

IN THE UNITED STATES COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA v. VINCENT SUNDRY	No. 72-30 CRIMINAL

Memorandum Opinion

The defendant, a physician, was found guilty on March 28, 1972 of all counts of an indictment which charged him with two counts of distributing Amphetamine tablets in violation of 21 U.S.C. 331(q)(2) and 21 U.S.C. 841(a)(1), respectively, one count of failing to keep complete and accurate records of certain drugs including Amphetamine tablets in violation of 21 U.S.C. 331(q)(4) and one count of conspiring to distribute Amphetamine tablets in violation of 18 U.S.C. 371 and 21 U.S.C. 846. On April 3, 1972 the defendant moved for arrest of judgment and/or for a new trial.

The reasons advanced in support of the motion were (1) that the verdict was contrary to the weight of the evidence, (2) that the verdict was contrary to law, (3) that the court erred in permitting extensive rebuttal testimony to be introduced by the Government and (4) that the Government did not satisfy its burden of proof that the defendant was not exempt from the record keeping provisions of 21 U.S.C. 331(q)(4). The motion also purported to reserve to the defendant the right to file additional reasons in support of his motions following the availability of the trial transcript. The additional reasons were not filed until September 22, 1972.

The defendant's attempted reservation is ineffective. F.R.Cr.P. 33 requires a motion for a new trial to be made "within 7 days after verdict or finding of guilty", and has been interpreted to mean that the grounds on which the motion is based must be filed within the time for making the motion. *United States v. Newman*, 456 F.2d 668 (3rd Cir. 1972). Similarly, F.R.Cr.P. 34 requires that a motion for arrest of judgment be made "within 7 days after verdict or finding of guilty". Therefore, only the reasons stated in the timely motion of April 3, 1972 will be considered. Those advanced in the "supplemental" motion of September 22, 1972, which in any event are either improper grounds for arrest of judgment or unmeritorious reasons for a new trial,[1] will be disregarded.

Turning to the reasons timely advanced, it must be borne in mind that the facts and inferences adduced at trial must be construed in the light most favorable to the Government. *Glasser v. United States,* 315 U.S. 60 (1942). The Government's star witness was a co-defendant, William Kleppner. Kleppner testified that through an arrangement with the defendant, he obtained Amphetamine tablets which he sold mostly to truck drivers. He testified that he split the profits from the operation with the defendant. Further, the Government introduced at trial a tape of a conversation between Kleppner and the defendant which tended to inculpate the defendant. Still further, the Government introduced corroborative evidence in the failure of the defendant's records to account for the lawful disposition of all the

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1. For example, the defendant's Fifth Amendment argument with respect to the record keeping violation was squarely rejected in *United States v. Reiff,* 435 F.2d 257 (7th Cir. 1970).

Amphetamine tablets which he purchased as a physician.

William Kleppner was a competent witness,[2] and while his testimony was not perfectly consistent in all particulars, it was not inconsistent in its essentials. His credibility, which is the focus of the defendant's attack, was, of course, for the jury. The verdict then, taking the evidence in the light most favorable to the Government, was not contrary to the weight of the evidence.

The defendant contends that the court erred in permitting the Government to introduce into evidence in rebuttal the charts which it prepared to support by computation its charge as to the discrepancy in the defendant's records relating to certain drugs including Amphetamine tablets. The defendant contends the charts stated opinions and conclusions which usurped the function of the jury. This contention is specious. The charts were of unadulterated facts relating to the inflow and outflow of Amphetamine tablets from the defendant's records. That one of those figures differed substantially from the other was purely a matter of mathematics and went to prove the third count of the indictment. It in no way stated an opinion or usurped the function of the jury.

Finally, the defendant contends the Government did not satisfy its burden of proving the defendant not exempt from the record keeping provisions of 21 U.S.C.

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2. An earlier motion by the defendant, subsequent to his conviction, to compel Kleppner to submit to a psychiatric examination was denied by Order of Court dated August 9, 1972. Cf. *United States v. Robinson,* 329 F. Supp. 723 (D. C. D. Del. 1971).

331(q)(4). That section exempts from its coverage, by reference to 21 U.S.C. 360a(d)(3), a licensed practitioner who, while acting in the course of his professional practice, dispenses, *inter alia,* Amphetamine tablets,

> ". . . unless such practitioner regularly engages in dispensing any such . . . drugs to his patients for which they are charged, either separately or together, with charges for other professional services."

The issue of whether or not the defendant was exempt was submitted to the jury. They were charged that the burden was the Government's to establish that the defendant was not exempt. That burden was satisfied, again taking the evidence in the light most favorable to the Government, by the testimony of Special Agent Robert Lumsden that he was told by the defendant that he charged his patients an extra dollar if during an office visit he gave them any Amphetamine tablets.

An appropriate Order will be entered denying the defendant's Motion For A New Trial And/Or The Arrest Of Judgment.

Order.

Order

AND NOW, to wit, this 17th day of October, 1972, in consideration of the foregoing Memorandum Opinion, IT IS ORDERED that the defendant's Motion For A New Trial And/Or Arrest Of Judgment in the above-captioned criminal case be and the same hereby is denied.

HUBERT I. TEITELBAUM
United States District Judge

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Pittsburgh, Pennsylvania 15219

Judgment Order.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 72-2041

UNITED STATES OF AMERICA
v.
VINCENT SUNDRY,
Appellant
(Western Dist. of Penna.—Crim. No. 72-30)

Submitted Under Third Circuit Rule 12(6)
March 23, 1973

Before SEITZ, *Chief Judge*, ALDISERT and ADAMS, *Circuit Judges.*

Judgment Order

After considering defendant's contentions that: (1) one count of the indictment was improperly based upon a repealed statute; (2) that this repealed statute was unconstitutional and therefore the search based upon the statute was illegal; (3) remarks made by the doctor during the search were taken in violation of his constitutional rights; (4) the district court erred in allowing in his statement without permitting him to contest the statement in the alernative; (5) the district court erroneously refused to order the Government's chief witness to submit to a psychiatric examination; (6) the district court erroneously instructed the jury on the corroborative effect of the charts used by a Government agent in his testimony; (7) the actual use of these

charts by the agent was prejudicially erroneous; and (8) the verdict was not supported by the weight of the evidence, and finding such contentions without merit, it is

ORDERED AND ADJUDGED that the judgment of the district court is affirmed.

BY THE COURT,
SEITZ
Chief Judge

Attest:
Clerk

DATED: March 23, 1973

Certified as a true copy and issued in lieu of a formal mandate on April 16, 1973.

Test:

THOMAS E. QUINN
Clerk, United States Court of Appeals
for the Third Circuit